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In The

Supreme Court of the United States

October Term, 1996

THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, THE HOME BUILDERS ASSOCIATION OF VIRGINIA AND THE HOME BUILDERS ASSOCIATION OF RICHMOND,

Petitioners,

v.

CHESTERFIELD COUNTY, VIRGINIA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the decisions of the district court and the court of appeals that a local zoning policy, authorized by a state statute unique to the Commonwealth of Virginia, is facially valid under the Fifth and Fourteenth Amendments to the United States Constitution.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Chesterfield County, Virginia ("County"), by counsel, respectfully requests the Court to deny the petition of the National Association of Home Builders of the United States, the Home Builders Association of Virginia and the Home Builders Association of Richmond (collectively "NAHB") for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on July 30, 1996.

STATEMENT OF THE CASE

A. Procedural Posture of the Case

On May 22, 1995, NAHB filed a complaint against the County claiming that the manner in which the County applies its Cash Proffer Policy ("Policy") to residential zoning cases violates the United States Constitution and the laws of the Commonwealth of Virginia. (Appendix ("App.") 1a)[1] The County filed a motion to dismiss because NAHB lacks standing to pursue an "as applied" constitutional challenge on behalf of its members. (App.

[1] Certain localities in Virginia, including the County, are authorized by state law to accept cash payments from a residential rezoning applicant to pay for public facilities necessitated by the applicant's proposed development. The payment proffered by the applicant is called a "cash proffer." The County's Cash Proffer Policy calculates the extent to which a new residential development will create a need for roads, schools, libraries and fire stations. The Policy then establishes a maximum amount per dwelling unit which the County will accept from a rezoning applicant to fund these capital needs.

1a-2a, 4a) The district court granted the County's motion holding that NAHB did not have standing to pursue its "as applied" challenge to the Policy and that NAHB had not alleged a facial constitutional claim.[2] The court also dismissed NAHB's state law claims. (App. 4a-5a)

NAHB then filed an amended complaint in which NAHB abandoned its "as applied" challenge to the Policy and raised a new facial constitutional challenge under the Fifth and Fourteenth Amendments to the United States Constitution. (App. 5a-6a) The district court permitted the Amended Complaint to be filed based in large part on NAHB's new allegation that "the 'mere existence' of Chesterfield County's Policy with respect to cash proffers have [sic] injured all of Plaintiff members." (App. 6a)

In October, 1995, the County filed a motion for summary judgment which was granted by the district court. (Petitioners' Appendix ("Pet. App.") A1) In its memorandum opinion (Pet. App. A2-A7), the court held 1) that the Policy on its face does not effect a taking of the property of NAHB or its members and 2) that no provision of the Policy prevents the County from accepting a constitutionally appropriate cash proffer from a residential rezoning applicant in accordance with this Court's decision in

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[2] The court held that the interests of the members of NAHB are so diverse as to create potential conflicts of interest among the membership. (App. 5a) Despite the name of the organization, NAHB's members include industrial and commercial builders, remodelers, suppliers, developers, real estate agents, architects, attorneys, engineers, bankers and utility companies. (App. 2a) NAHB's membership list comprises 3,619 pages of computer printouts.

Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309 (1994). As the court concluded:

> . . . [T]here is no reason apparent on the face of the Policy why the proffers required, if any, can not [be] determined in an "individualized" manner and fixed at an amount "roughly proportional" in "nature and extent to the impact of the proposed development" according to the test set out in *Dolan v. Tigard*.

(Pet. App. A6-A7)[3] Contrary to NAHB's assertions that the County "exacts" cash proffers from rezoning applicants, the district court also found that neither the Policy, nor the County's application of the Policy, mandates the payment of cash proffers by such applicants. (Pet. App. A6, n.2)

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[3] Both the district court and the court of appeals concluded, consistent with the holding in *Dolan*, that the County could make individualized cash proffer decisions that were roughly proportional to the impact of a particular development. (Pet. App. A6-A7; B3-B4) Nonetheless, NAHB asserts repeatedly in its petition that these courts "repudiated" *Dolan*. For example: 1) " . . . [T]his Court needs to . . . correct the Fourth Circuit's radical departure from, and blatant repudiation of, this Court's precedent. . . . " (Petition ("Pet.") 6); 2) "Indeed, the Fourth Circuit's opinion repudiates this Court's mandate. . . . " (Pet. 7); 3) "The Fourth Circuit's refusal to properly apply *Dolan* to the Chesterfield County Policy is inexplicable." (Pet. 7); 4) "The District Court's refusal to apply *Dolan* is equally baffling." (Pet. 7 n.17); 5) "The sum of the Fourth Circuit's defiance and misapplication of *Dolan* is that the Fourth Circuit incorrectly found that the Policy was constitutionally sound." (Pet. 8); 6) "This Court should grant certiorari in order to correct this impudence." (Pet. 7).

On July 30, 1996, the United States Court of Appeals for the Fourth Circuit, in a per curiam opinion, affirmed the decision of the district court stating that, under the terms of the Policy, the County could comply with the requirements of *Dolan* and make legitimate individualized cash proffer determinations in amounts which were roughly proportional to the impact of a proposed development. (Pet. App. B1-B4) The court of appeals also rejected NAHB's contention that *Dolan* requires the County to establish "exact proportionality" between the impact of a proposed development and the amount of cash proffered by a rezoning applicant in order to comply with the Constitution. (Pet. App. B4) At oral argument before the court of appeals, counsel for NAHB contended that the County "would have to show exactly" how a development creates additional demand for public facilities in order to satisfy *Dolan*. In fact, counsel asserted that to satisfy *Dolan*, the County could, for example, be required to canvass each residence, determine how many school-aged children lived in the residence and find out whether the children went to public or private schools. The court of appeals properly concluded that NAHB's notion of "exact proportionality", which was specifically rejected by this Court in *Dolan* in favor of the "rough proportionality" test, was "not required under the Constitution, nor feasible in practice." (Pet. App. B4)

B. Statement of Facts

In 1989, the Virginia General Assembly enacted legislation permitting certain "high growth" localities, including Chesterfield County, to accept cash proffer dedications from residential rezoning applicants in order

to partially offset the cost of public facilities generated by the applicant's proposed development. *Va. Code* § 15.1-491.2:1. The County adopted an ordinance in 1989 allowing the County to accept cash proffers. No other state has a program equivalent to Virginia's cash proffer program.

Before 1989, the residential development industry in Chesterfield County had not contributed significantly to the cost of new public facilities necessitated by development. (App. 14a, ¶ 4) Nor had the County adopted any methodology to determine a maximum contribution which rezoning applicants could appropriately proffer to offset this cost. (App. 14a, ¶ 4) A cash proffer committee ("Committee") was formed to develop a proposed methodology for cash proffers. The 10-member Committee included the attorney for the petitioner, Home Builders Association of Virginia, two representatives of the petitioner, Home Builders Association of Richmond ("HBAR") and several local developers and home builders. (App. 14a, ¶ 5) In addition, HBAR hired a Bethesda, Maryland consultant named Paul Tischler, who had performed development-related fiscal impact analyses for other localities across the country. (App. 14a, ¶ 5)

After extensive discussion among members of the Counties governing body, Board of Supervisors ("Board"), County staff and Committee members, a cash proffer methodology was created which encompassed Tischler's proposed methodology with some modifications. This methodology ultimately became the Policy which is the subject of this case. (App. 15a, ¶ 8) On February 14, 1990, the Board held a public hearing to consider the proposed

Policy and on March 14, 1990 the Board adopted the Policy. (App. 15a, ¶ 10)

The Policy establishes a maximum cash proffer amount which the Board can accept from a rezoning applicant. (Pet. App. C2-C3, ¶ B1e; Pet. App. C5, ¶ B10; App. 15a-16a, ¶ 11) The cash proffer must be used to fund projects in the County's current Capital Improvement Program in accordance with the requirements of *Va. Code* § 15.1-491.2:1. (Pet. App. C3, ¶¶ B2-B3) County-wide districts are used to calculate the impact of each residential unit on libraries, parks and fire stations because each one of these facilities is available to citizens regardless of where they live. (Pet. App. C3, ¶ B6) For example, new residential growth creates the need for 5.53 acres of parks for every 1000 people, 2.34 new library books per person, and 99 square feet of new school space per student (Pet. App. C2, ¶ B1b.) Even though residential development also generates the need for other public facilities, such as solid waste disposal, mental health and correctional facilities, the Policy exempts home builders from contributing to the capital costs of these facilities. (Pet. App. C3, ¶ B3)

In order to calculate the per-dwelling cost of new roads necessitated by residential growth, the County is divided into two service districts. The County is also divided into 19 traffic sheds. If a residential development generates the need for road improvements, road-related cash proffers from a development within a particular traffic shed are used solely for road improvements within that shed. (Pet. App. C4, ¶ B6) The Policy also divides the County into two geographic service districts for the purpose of applying school cash proffers based on the impact of new residential development on middle and high

schools. The County is divided into eight zones for elementary schools. If a residential development generates the need for school cash proffers, the proffers can only be expended in the appropriate district or zone in which the development is located. (Pet. App. C4, ¶ B6; App. 16a, ¶ 13)

The Policy applies to all residential rezoning requests and permits the Board to grant rezoning requests with a proffer that is below the maximum amount or with no cash proffer at all. (Pet. App. C3, ¶ B4; App. 16a, ¶ 12) In all rezoning cases, the County must determine that there is "a relationship between the rezoning itself and the need for a public facility" before it can accept a proffer. (Pet. App. C3, ¶ B6) Consistent with the requirement that cash proffers "can only apply to needs created by the new zoning" and "must be reasonably related to a capital need created by the rezoning" (App. 15a, ¶ 10; App. 12a), the Board regularly approves residential rezoning cases in which the rezoning applicant has proffered less than the maximum cash proffer, or has made no cash proffer, because of the individual circumstances of each rezoning case. (App. 16a, ¶ 14; App. 10a-11a)[4]

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[4] Throughout its petition, NAHB contends that the County "exacts" cash proffers from developers. *See, e.g.*: 1) "The Policy requires Petitioner's members to pay cash and to dedicate real property to Chesterfield County as a condition for the right to construct residential housing" (Pet. iii); 2) "The Policy functions to exact monies and real property from residential rezoning applicants" (Pet. 2); 3) "[T]he Policy denies residential zoning to agricultural land unless the rezoning applicant agrees to pay

REASONS FOR DENYING THE WRIT

A. The Lower Courts Properly Followed the Precedent of This Court to Dismiss NAHB's Facial Challenge

In its amended complaint, NAHB abandoned its original "as applied" constitutional challenge to the Policy and instead contended 1) that the "mere existence" of the Policy injured all of NAHB's members and 2) that the Policy on its face constitutes an uncompensated taking of private property in violation of the Fifth Amendment. As this Court has held repeatedly, a purely facial challenge to a general governmental regulation is "the most difficult challenge to mount successfully." *United States v. Salerno*, 481 U.S. 739, 745 (1987). The party making such a challenge faces an "uphill battle." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987).

The district court analyzed NAHB's facial claim in two parts. First, since NAHB claimed that the mere enactment of the Policy constituted an unconstitutional taking,

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cash. . . . " (Pet. 11); 4) "[T]he primary exaction required under the Policy is money." (Pet. 14 n.37); 5) "Cash proffers are mandatory." (Pet. 17). Despite these conclusory assertions, the uncontradicted facts accepted by the district court establish that the County has approved numerous residential rezoning requests even though the applicants made no cash proffers or made proffers which were below the maximum proffer amount provided for in the Policy. (App. 10a-11a; App. 16a, ¶ 14) NAHB's own affidavits confirm that the County approves zoning cases even though the developer proffers less than the maximum amount under the Policy (Pet. App. A6 n.2). In light of these facts and the unambiguous language of the Policy, the lower courts properly rejected NAHB's "mandatory cash proffer" contention. (Pet. App. A6, B3)

the court properly examined the claim using the test in *Agins v. Tiburon,* 447 U.S. 255 (1980) which requires a showing that the Policy "denies the owner economically viable use of his land." *Id.,* 447 U.S. at 260. The court concluded that the Policy did not result in any physical invasion by the County of private property nor did it deprive anyone of the economically viable use of their property. NAHB does not dispute these conclusions in its petition nor did it challenge them before the court of appeals.

Second, the district court analyzed the Policy to determine whether it was "capable on its face of application consistent with the *Dolan v. Tigard* standard." (Pet. App. A5) This analysis was appropriate under *United States v. Salerno* to determine whether there were any set of circumstances under which the Policy would be valid. *Id.,* 481 U.S. at 745. The district court properly held that the Policy would not prevent the County from following the requirements of *Dolan* because:

1) the Policy does not require any developer to proffer cash,

2) the Policy only sets a maximum proffer amount for a proposed development,

3) the Policy utilizes a complex methodology to calculate the maximum proffer amount for each proposed development and

4) the County approves residential rezoning applications with less than the maximum cash proffer or with

no proffer at all based on the individual circumstances of each rezoning case.[5]

As the court stated, "there is no reason on the face of the Policy" why the County cannot determine cash proffers in an individualized manner and fix them at an amount which is roughly proportional to the impact of a proposed development. (Pet. App. A6-A7)

NAHB repeatedly represents in its Petition that neither the district court nor the court of appeals considered or applied *Dolan* in reaching their decisions. NAHB actually claims that both lower courts "repudiated" *Dolan* and relied solely on *Agins* to reach their decisions. This assertion is contradicted by the written opinions of both courts which utilize *Dolan*'s "individualized determination" and "rough proportionality" tests and which cite *Dolan* by name.[6]

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[5] The description "complex methodology" was used by the court of appeals in its per curiam opinion. (Pet. App. B3) The complexity of the methodology ensures that the calculated maximum cash proffer is directly related to an individual development and is reasonably proportional to the impact of the development. The complexity of the methodology also belies NAHB's repeated and unsupported contentions that the County does not make individualized cash proffer determinations that are roughly proportional to a development's impact.

[6] NAHB goes so far as to charge that, during the oral argument before the court of appeals, both Judges Russell and Widener "expressed their disdain for this Court's *Dolan* decision by flatly stating that the 'individualized determination' requirement was 'stupid.' " (Pet. 8 n.19) No such statement was made by any member of the court of appeals. In any regard, it is the written opinion issued by a court, not the socratic dialogue which occurs during argument, which defines the parameters of the court's decision.

Furthermore, the language of the Policy itself contradicts NAHB's assertion that the Policy is facially unconstitutional. The Policy does not require a developer to proffer cash. It does not set an amount to be proffered but instead establishes a maximum proffer amount based on a complex methodology that accounts for the individualized need for public facilities generated by a proposed development. (Pet. App. C1-C5) The Policy expressly embraces the concept of a "reasonable relationship" between cash proffers and development impact. (Pet. App. C1, C3) In addition, the cash proffers which are proffered by a rezoning applicant for a particular development must be spent only on public projects which are currently identified in the County's Capital Improvement Program and which are necessitated by the impact of that development. (Pet. App. C3; App. 15a-16a, ¶¶ 11-13) Furthermore, the facts of this case establish that, in applying the Policy, the County accepts cash proffers based on an individualized assessment of the impact of each development. For example, in five separate rezoning cases the Board has accepted cash proffers that omitted funding for schools since the proposed projects contained retirement communities which were unlikely to generate school children. (App. 10a-11a) Contrary to NAHB's contentions, there is no reason why the County must violate *Dolan* in order to apply its Policy to individual rezoning cases.[7]

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[7] NAHB also contends that the County is improperly "banking" cash proffers contrary to the decision in *Simpson v. City of North Platte*, 206 Neb. 240, 292 N.W.2d 297 (1980). The Supreme Court of Nebraska properly invalidated the city's "land banking" because there was absolutely no nexus between the governmental exaction and any need created by the

B. Courts are Properly Applying *Dolan* to Judge the Constitutionality of Individual Land Use Decisions

As this Court explained in *Dolan*, the decisions in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan* apply to land use cases affecting individual properties in which the government requires an exaction of property as a condition for land use approval. *Dolan*, 114 S. Ct. at 2316-17; 2320 n.8. In these circumstances, the burden is placed on the government to justify the exaction by proving that it is reasonably related to the impact of the land use approval being granted. *Id.*, 114 S. Ct. at 2319-20.

Since *Dolan*, the lower courts have consistently applied *Dolan* to judge the constitutionality of land use exactions. For example, *see Goss v. City of Little Rock*, 90 F.3d 306 (8th Cir. 1996) (*Dolan* test used to remand case involving exaction of road right-of-way); *Erlich v. City of Culver City*, 12 Cal. 4th 854, 911 P.2d 429 (1996), *cert. denied*, 136 L.Ed.2d 218 (1996) (City demanded monetary exaction in exchange for construction permit; case remanded for lower court to consider in light of *Dolan*)[8];

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development, as mandated by *Dolan*. *Id.*, 292 N.W.2d at 301. In this case, the County accepts and spends cash proffer funds only for currently identified public projects the need for which is specifically generated by that residential development. (Pet. App. C1-C4)

[8] NAHB inexplicably represents in its Petition that the court in *Erlich* "declined" to apply *Dolan* to the monetary exaction at issue. (Pet. 13 n.35). The Supreme Court of California specifically applied *Dolan* to remand the case and then directed the lower court to apply the *Dolan* test when it reconsidered the case. *Id.*, 911 P.2d at 432-34.

Schultz v. City of Grants Pass, 131 Ore. App. 220, 884 P.2d 569 (1994) (*Dolan* used to judge the constitutionality of conditions imposed by locality in individual zoning case); *Trimen Dev. Co. v. King County*, 124 Wash. 2d 261, 877 P.2d 187 (1994) (same); *J.C. Reeves Corp. v. Clackamas County*, 131 Ore. App. 615, 887 P.2d 360 (1994) (court applied *Dolan* to analyze the constitutionality of exactions required as a condition of subdivision approval.)

NAHB cites *Harris v. City of Wichita*, 862 F. Supp. 287 (D. Kan. 1994), *aff'd without op.*, 74 F.3d 1249 (10th Cir. 1996), *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 264 Ga. 764, 450 S.E.2d 200 (1994), *cert. denied*, 115 S. Ct. 2268 (1995), and *Home Builders Ass'n of Cent. Arizona v. City of Scottsdale*, 183 Ariz. 243, 902 P.2d 1347 (1995) in an attempt to create a "conflict" in lower court decisions. In each of these cases, however, the issue was not a governmental exaction in exchange for a land use approval or benefit. Instead, these cases involved attacks on general land use regulations: *Harris* (amendment of use restrictions in Airport Overlay Districts); *Parking Association* (enactment of an ordinance requiring landscaped areas in parking lots); *City of Scottsdale* (facial challenge to an ordinance establishing a general development fee to cover the cost of utility extensions).[9] Each one of these

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[9] Even though the Arizona court found *Dolan* to be inapplicable to the general fee regulation at issue, it found that the fee was "directly necessitated by the needs created by the new development" and "was to be used to benefit the property on which the fee was imposed." *Id.*, 902 P.2d at 1350. These findings would be sufficient under *Dolan* to establish an essential nexus between the fees and the impact of the development.

courts properly analyzed *Dolan* and concluded that it did not apply to judge the constitutionality of the general land use regulation at issue. These decisions are not at variance with this Court's decision in *Dolan* which specifically distinguished general regulations from specific exactions. *Id.*, 114 S. Ct. at 2316-17. Nor do they create the type of "real and embarrassing conflict of opinion and authority" that warrants a grant of certiorari. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).[10] Instead, the lower courts are uniformly demonstrating that they understand *Dolan* and are not at all reluctant to apply *Dolan* when analyzing the constitutionality of individual land use decisions.

C. This Case Presents a Unique Factual Setting Which is Unsuitable to Review the Principles of *Dolan*.

In *Dolan*, the planning commission for the City of Tigard, Oregon required Mrs. Dolan to dedicate land for a public greenway and a pedestrian/bike pathway before

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[10] NAHB also tries to manufacture a conflict among the courts by claiming that some courts do not apply *Dolan* to exactions of money in exchange for land use approval. To make this claim, NAHB asserts that the courts in *McCarthy v. City of Leawood*, 257 Kan. 566, 894 P.2d 836 (1995) and *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566 (10th Cir. 1995) held that *Dolan* did not apply to monetary exactions (Pet. 14 n.36). The court in *McCarthy* dismissed the plaintiffs' *Dolan* claim because the plaintiffs cited no authority to support their claim and because the plaintiffs had never presented the claim to the trial court. *Id.*, 894 P.2d at 845. In *Clajon*, the court examined the constitutionality of hunting regulations promulgated by the State of Wyoming; the case had nothing to do with monetary exactions.

the commission would approve an application to expand her plumbing and electric supply store. *Id.*, 114 S. Ct. at 2313-14. Dolan brought an "as applied" challenge to the dedication requirement and this Court held that the city's requirements could constitute an uncompensated taking of Dolan's property.

The mandatory dedication of property as a condition of development approval and the assessment of impact fees at the time of development are common methods used by localities throughout the United States to finance the capital needs created by new development. This Court has considered a number of such cases as have the lower courts. In contrast, the present case involves a land use program, cash proffers, that is unique to Virginia. No other state has such a program and, even in Virginia, not every locality is authorized by the General Assembly to accept cash proffers. Virginia's cash proffer program is limited by statute to "high growth" localities, certain jurisdictions adjacent to these localities and selected Northern Virginia localities. Any further consideration by this Court of the Policy in light of the *Dolan* decision would have limited value when applied by lower courts to the usual "as applied" exaction cases which *Dolan* addresses.

In addition, since this case is limited to a facial challenge to the Policy, the only issue relating to *Dolan* is whether the Policy can be applied consistent with *Dolan*'s requirements. This case does not contain any factual circumstances or details which can be analyzed under the "individualized determination" or "rough proportionality" tests established by this Court. Accordingly, further review of this case will not provide the lower

courts with any greater guidance on how to apply *Dolan* to the individual, fact-specific disputes which come before them.

CONCLUSION

For each of the foregoing reasons, the County, by counsel, respectfully requests that NAHB's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, et al., Plaintiffs,	)	Civil Action No. 3:95CV402
v.	)	
CHESTERFIELD COUNTY, Defendant.	)	

MEMORANDUM

(Filed Sept. 1, 1995)

This matter comes before the Court on Plaintiffs' "Motion to Amend Judgment and For Leave to File Amended Complaint." Plaintiffs are the National Association of Home Builders of the United States ("NAHB"), Home Builders Association of Virginia ("HBAV"), and Home Builders Association of Richmond ("HBAR"). Defendant is Chesterfield County, Virginia. Plaintiffs filed their complaint on May 22, 1995, seeking declaratory and injunctive relief for violations of the Fifth and Fourteenth Amendments to the United States Constitution pursuant to 28 U.S.C. §§ 2201 and 2202 and Rule 65 of the Federal Rules of Civil Procedure and for violations of Virginia Code § 15.1-491.2:1 and other state law.

On June 12, 1995, Defendant moved to dismiss Plaintiffs' action for lack of subject matter jurisdiction and failure to state a claim pursuant to Rules 12(b)(1) and

12(b)(6) of the Federal Rules of Civil Procedure. The Court granted Defendants' motion and dismissed Plaintiffs' complaint on July 18, 1995, holding that Plaintiffs lacked standing to bring the action.

Plaintiffs now move the Court pursuant to Rule 59(e) of the Federal Rules of Civil Procedure to amend its Order dismissing the action and to allow them to file and amended complaint. Defendant opposes this motion.

Background

This action arose out of a policy allegedly used by Chesterfield County in deciding residential zoning cases. NAHB is a trade association for the home building and construction industry and its members include not only builders that construct and supply single family homes, but also apartment, condominium, commercial and industrial builders, developers, remodelers, suppliers, subcontractors, real estate agents, architects, attorneys, engineers, banks, and utility companies. HBAV and HBAR are NAHB affiliated associations.

Some of the members of these associations are engaged in the construction, financing, sale and service of homes in Chesterfield County, including the development of residential subdivisions. Before these members can begin development, they must secure the necessary rezoning approval from Defendant Chesterfield County ("the County"). Plaintiffs allege that the County maintains an official and formally adopted policy of demanding cash proffers from rezoning applicants in return for

approval of the applications.[1] According to Plaintiffs, the County will not grant the requested rezoning unless the cash proffer is made. Plaintiffs also claim that the County regularly requires the applicants to dedicate other valuable consideration as a condition of rezoning approval. It is Plaintiffs' position that these involuntary cash proffers violate state law and bear no relationship to the cost to the County of rezoning the requested area. Thus, Plaintiffs contend that such proffers violate the Fifth and Fourteenth Amendment rights of their members seeking to develop in the County.

Discussion

In the instant motion, Plaintiffs claim that their proposed amended complaint cures the defects in standing noted by the Court in the July 18, 1995 Memorandum accompanying its Order dismissing this action. They assert that pursuant to Rule 59(e), the Court should amend its Order to allow them to file their amended complaint.

Defendant responds that the sole purpose of Rule 59(e) is to correct manifest errors of law or fact or to present newly discovered evidence and should only be considered when a court (1) has patently misunderstood a party's case, (2) has made a decision outside of the adversarial issues presented by the parties, or (3) has made a manifest error of reasoning but of apprehension. *See Hutchinson v. Staton*, 994 F.2d 1076 (4th Cir. 1993).

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[1] Plaintiffs claim that the County calls these proffers "voluntary" when they are, in fact, mandatory.

According to Defendant, Plaintiffs have not advanced any reason for the Court to grant Rule 59(e) relief. Defendant also contends that Plaintiffs' proposed amended complaint does not cure the defects in Plaintiffs' standing which led to the dismissal of their lawsuit.

The Court dismissed Plaintiffs' complaint because it concluded that the complaint did not contain allegations sufficient to support the conclusion that the Plaintiffs could assert associational standing to sue on behalf of their members. The Order dismissing the action did not specify whether this action was dismissed with or without prejudice; however, the Court did not intend to dismiss this action with prejudice. Plaintiffs may amend their complaint without resorting to Rule 59(e), provided the Court is satisfied that such amendment satisfies the defects in the original complaint and would not be futile for any other reason. For the reasons stated below, the Court is satisfied that Plaintiffs should be allowed to file their amended complaint.

Pursuant to Defendant's June 12, 1995 motion to dismiss, the Court first observed that Plaintiffs had not alleged a facial challenge to the County's policy and were left to succeed or fail on an as applied challenge. The Court then determined that Plaintiffs lacked standing to bring an as applied challenge to the policy on behalf of their members under the three part test enunciated in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). When a suit is brought by an association such as NAHB, the Supreme Court has determined that the association may assert representational standing based on the rights of its members under the following conditions:

> An organization has representational standing when (1) its own members would have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organization's purpose; and (3) neither the claim nor the relief sought requires the participation of individual members in the lawsuit.

Hunt, 432 U.S. at 343.

After applying this three-part test, the Court concluded that Plaintiffs failed to meet the third requirement because of potentially conflicting interests among their members and because the case by case analysis necessitated by an as applied challenge in these circumstances would require the participation of the individual members of the associations to demonstrate the specific constitutional violations.

In their amended complaint, Plaintiffs now purport to mount a facial challenge to the County's alleged policy. In dismissing the original complaint, the Court determined that Plaintiffs failed to raise a facial challenge to the policy because they had not alleged that the mere existence of the policy unconstitutionally affected the property rights of their members by adversely affecting property values and the opportunities of the market. *Beacon Hill Farm Assoc. v. Loudoun County Supervisors*, 875 F.2d 1081, 1083 (4th Cir. 1989).

In their amended complaint, Plaintiffs make the following allegations:

> 3. This action facially challenges the constitutional validity of the Policy maintained and enforced by Chesterfield County. Plaintiffs state that Chesterfield County's Policy is universally

> and routinely applied to residential rezoning applicants in violation of the United States Constitution, Amendments Five and Fourteen. There are no circumstances under which Chesterfield County could apply its Policy in a constitutional manner.
>
> * * *
>
> 12. The "mere existence of Chesterfield County's Policy with respect to cash proofers have injured all of Plaintiffs' members. Chesterfield County's Policy not only directly raises costs upon residential rezoning applicants and the builders who construct homes, but also interferes with the value of real property, generally creating artificial prices and discouraging needed development and progress.

Plaintiffs' Amended Complaint at ¶¶ 3, 12.

The Court is satisfied that these amendments to the complaint allow Plaintiffs to state a facial challenge to the alleged policy. The Court determines that Plaintiffs' ability to state a facial claim at this stage of the proceedings obviates the need for the participation of Plaintiffs' individual members to present proof of the alleged constitutional violations on a case by case basis. Accordingly, Plaintiffs may meet the third requirement of the *Hunt* test if they can satisfy the Court that there are no potential conflicts of interest among Plaintiffs' members.[2]

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[2] Moreover, the Court is of the opinion that the facial challenge asserted in Plaintiffs' amended complaint diminishes the concerns regarding ripeness issues that were raised by the Plaintiffs' original complaint.

As to the conflicts among their members, Plaintiff makes the following allegations in their amended complaint:

> 13. Chesterfield County's interference with the real property market affects all Plaintiffs' members. Distortion in real estate prices affects all developers and builders, residential or commercial. Furthermore, to the extent that Chesterfield County's Policy discourages, slows, or prevents residential development and the provision of affordable housing, the demand for other commercial and residential construction is lessened. Simply put, fewer people require fewer services, be it those provided by public or private entities. Moreover, Plaintiffs' members who provide services to the residential housing industry, be they subcontractors, suppliers, attorneys, or banks, depend upon a vibrant, thriving, and growing housing market. Thus, Chesterfield County's Policy detrimentally affects Plaintiffs' members across their extensive spectrum.

Plaintiffs' Amended Complaint at ¶ 13. Plaintiffs also allege that all of Plaintiffs' members "share a common goal of involvement in the housing industry and the provision of affordable housing throughout the country." Plaintiffs' Amended Complaint at ¶¶ 7, 8, 9.

In discussing conflict in its July 18, 1995 Memorandum the Court stated:

> The Court determines that in this case, according to Plaintiffs' own allegations, their members interests are too varied for Plaintiffs to be the appropriate vehicle to litigate this attack on the County's alleged policy.

* * *

> While the Court recognizes that this case does not present a particularly stark example of conflict, the Court is concerned that allowing Plaintiffs to represent their members in this lawsuit requires the Court to speculate extensively concerning the interests of Plaintiffs' members. Consequently, the Court concludes that Plaintiffs should not be permitted to represent the interests of certain of their members in federal court.

July 18, 1995 Mem. at 16-17.

While the Court is still somewhat concerned about the wide variety among Plaintiffs' many members, the Court determines that its concerns have been sufficiently alleviated to allow Plaintiffs to file their amended complaint. The Court reiterates that even before the proposed amendment to the complaint, the Court did not find the potential conflict among Plaintiffs' members to be "particularly stark"; however, the Court was unwilling to conclude that Plaintiffs had standing because of the additional participation necessitated by the individualized proof needed to succeed on an as applied challenge.

The Court now concludes that where conflict among members' interests stands alone as a bar to associational standing, there must be more actual or more concretely threatened potential conflict than can be inferred from Plaintiffs' amended complaint.[3]

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[3] The Court also notes that at least one other circuit has held that in order to prevent an association from asserting standing, the conflict must be direct and profound and there

Accordingly, the Court determines that Plaintiffs may file their amended complaint.

An appropriate Order shall issue.

/s/ Robert R. Merhige, Jr.
United States
District Judge

SEP 1 1995
Date

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may be other methods of remedying the conflict less drastic than dismissal for lack of standing. *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 603-07 (7th Cir. 1993).

EXHIBIT 1

APPROVED ZONING CASES IN WHICH REDUCED OR NO CASH PROFFERS WERE OFFERED BY APPLICANT

	APPLICANT	ZONING CASE #	COMMENTS
1.	Betty Parker	90SN0177	Proffers not offered. Case approved.
2.	Long Meadow Farms	89SN0444	Case approved. Applicant proffered $1675 per lot.
3.	Carnes Braxton Retirement	90SN0289	Retirement community. No cash proffer for schools. Case approved.
4.	William & Gene Duval	92SN0167	Rezoning for two additional residential lots when combined with adjacent parcel. No cash proffer. Case approved.
5.	Larry Goldman	94SN0205	Retirement community. No cash proffer for schools. Case approved.
6.	C.C. Moore	91SN0227	No proffer on one lot. Case approved.

7.	Rivers Bend	95SN0109	Retirement community. No cash proffer for schools. Case approved.
8.	Moss	92SN0137	Proffers not offered. Case approved.
9.	Bonarco and Marchetti Assoc.	95SN0186	Rezoning permitting retirement community. No cash proffer for schools. Case approved.
10.	Chesterfield Redevelopment Associates	95SN0309	Rezoning permitting retirement community. No cash proffer for schools. Case approved.

Total rezoning cases approved since adoption of cash proffer policy: 41

Total rezoning cases approved with less than maximum cash proffers or with no cash proffers: 10

LEGAL CONSTRAINTS

1. Must adopt a local cash proffer ordinance providing for the acceptance of cash proffers (Cash proffer ordinance adopted August 1989).
2. Cash proffer can only apply to needs created by the new zoning, cannot apply cash proffers to existing costs or service deficiencies.
3. Amount of the cash proffer must be reasonably related to a capital need created by the rezoning.
4. Cash may only be accepted when the future improvements to be funded by the proffer are listed in the County's Capital Improvement Program.
5. If cash is not used for proffered purpose it must be returned to the applicant.

Defendant's
Exhibit
4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES

and

HOME BUILDERS ASSOCIATION OF VIRGINIA

and

HOME BUILDERS ASSOCIATION OF RICHMOND,

Plaintiff,

v. Civil Action No. 3:95CV402

CHESTERFIELD COUNTY, VIRGINIA,

Defendant.

AFFIDAVIT OF JAMES J. L. STEGMAIER

JAMES J. L. STEGMAIER, being first duly sworn, states as follows:

1. I am currently the Director of Budget and Management for Chesterfield County ("County").

2. My responsibilities include directing financial planning and debt management for the County, coordinating organizational and community strategic planning and managing fiscal impact analyses and cash proffers.

3. In 1989, the County amended its conditional zoning ordinance to authorize the acceptance of cash proffers based on the state enabling legislation.

4. Prior to 1989, residential growth and development had not provided any significant share of the costs to fund new growth-related public facilities. After analyzing the projected growth of residential development in the County and the existing capital facilities which were available to serve this new population, the County determined that revenues (taxes and fees) generated by growth would only cover the County's normal operating costs to provide services to these new residents and would not cover the costs of facilities needed to provide the services.

5. County staff decided that it would be necessary to develop a methodology to determine the appropriate maximum cash proffer contribution. A cash proffer committee ("Committee") was formed to help develop proposed methodology, facility costs and policies regarding acceptance of cash proffers. The 10-member Committee included the attorney for the Home Builders Association of Virginia, two representatives of the Home Builders Association of Richmond and several local developers. In addition, the Home Builders Association of Richmond hired a Bethesda, Maryland consultant named Paul Tischler who had performed fiscal impact analyses for other localities across the country and Dr. Robert Cook, an economics professor from the University of Richmond.

6. The Home Builders Association of Richmond informed the Committee that it had asked Tischler to develop a proposed methodology for the Policy. Tischler met with County staff members to obtain data for the proposed methodology and then presented his analysis to the Committee.

7. The Committee held several meetings with County staff and attended a retreat with the County's Board of Supervisors ("Board") on January 25-26, 1990 to discuss the proposed methodology. The purpose of those meetings was to receive input from the development community and insure that the County developed a policy which complied with the enabling legislation and legal requirements.

8. After extensive discussion among Board members, County staff and Committee members, a methodology was created which contained Tischler's proposed methodology with some modifications. This ultimately became the County's cash proffer policy ("Policy").

9. The final version of the Policy contained language, which the home building community supported, requiring a relationship between any cash proffer made by a developer of a residential development and the development itself. The purpose of this language was to insure that any cash proffers offered by a developer would be logically and legally defensible and would be supported by a written, published and rational methodology.

10. On February 14, 1990, the Board held a public hearing to consider the proposed cash proffer policy and on March 14, 1990 the Board adopted the Policy. The Board has amended the Policy at various times since 1990. The Board is given Exhibit 4 when it reviews the Policy.

11. The language of the Policy adopted by the Board provides guidelines for the Board to consider when an applicant proffers cash as part of a residential zoning case

and establishes a maximum cash proffer amount which the board can accept from an applicant.

12. The Policy is "applicable to all residential rezoning requests" and permits the Board to grant residential rezoning requests with a proffer that is below the maximum amount or with no cash proffer.

13. Cash proffers collected for a particular residential development are applied solely to public facilities which serve that development. All fire stations, parks and libraries serve all residential developments. Money for schools and roads will only be spent for those schools and roads within the service district or zone which serves the particular residential development.

14. The Board has considered forty-one cases since the adoption of the Policy for which cash proffers could be made. Of those cases, the Board has approved 10 with less than the maximum cash proffer or with no cash proffer. Exhibit 1 accurately describes these cases and the circumstances surrounding these cases.

15. The Board has denied requests for rezoning when the applicant offered the maximum cash proffer amount. On July 26, 1995, the Board voted unanimously to deny a request by Dean Ted Patrick to rezone approximately 74 acres from Agricultural (A) to Residential (R-9) despite the fact that Patrick proffered to pay the maximum cash proffer. Exhibit 3 is the certified minutes of the Board meeting at which this decision was made.

16. I am competent to testify to the matters sworn by me in this Affidavit. All statements sworn to by me in

this Affidavit are within my personal knowledge and I swear and certify that the statements are true.

JAMES J. L. STEGMAIER

/s/ James J. L. Stegmaier

COMMONWEALTH OF VIRGINIA;
COUNTY OF CHESTERFIELD, to wit:

I, Joy D. Beavers, a Notary Public in and for the Commonwealth and County aforesaid, do hereby certify that JAMES J. L. STEGMAIER, Director of Budget and Management for the Chesterfield County, whose name is signed to the foregoing Affidavit has acknowledged the same before me in my jurisdiction aforesaid and sworn that the information contained therein is correct to the best of his knowledge and belief.

Given under my hand this 31st day of October, 1995.

My Commission Expires: March 31, 1996.

/s/ Joy D. Beavers
Notary Public